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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1970

No. [redacted] 63

GROVE PRESS, INC., HOWARD WAGONHEIM & 5 WEST AMUSEMENT CO., INC., *Appellants*,

v.

MARYLAND STATE BOARD OF CENSORS, *Appellee*.

On Appeal from the Court of Appeals of Maryland

MEMORANDUM FOR THE AMERICAN CIVIL LIBERTIES UNION AND THE MARYLAND CIVIL LIBERTIES UNION AS AMICI CURIAE

THOMAS R. ASHER
1320 Nineteenth Street, N.W.
Washington, D.C. 20036
Attorney for American Civil Liberties Union and Maryland Civil Liberties Union

DAVID H. SCHWARTZ
1815 H Street, N.W.
Washington, D.C.

JOHN F. GRAYBEAL
910 Seventeenth Street, N.W.
Washington, D.C.

MELVIN L. WULF
156 Fifth Avenue
New York, New York
Of Counsel

Washington, D.C. THIEL PRESS 202 393 0625

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JURISDICTION

This Memorandum is filed with the consent of the parties[1] pursuant to Rule 42(1) of the Rules of this Court.

PURPOSE OF THIS MEMORANDUM

Amici agree with Appellants on the two basic questions: (1) that this Court should exercise its jurisdiction to review

[1] Appellants limit their consent as follows: "So long as it does not result in any further extension for the filing of a responsive motion."

the decision of Court of Appeals of Maryland and (2) that that decision, which prohibits the exhibition of the motion picture "I Am Curious (Yellow)" in Maryland, is plainly erroneous. However, we suggest that plenary review should be granted to permit this Court to reconsider the constitutionality of the Maryland motion picture censorship statute and the standard which has been utilized to measure whether motion pictures and publications are "obscene", and therefore outside the First Amendment's protections, since the 1957 decision of *Roth v. United States*, 354 U.S. 476.

Accordingly, this Memorandum will be limited to those issues as to which we have something substantial to add to the Jurisdictional Statement (hereinafter "J.S.").

I. THE MARYLAND CENSORSHIP STATUTE IS UNCONSTITUTIONAL

Maryland is the only state in the Union which imposes prior censorship upon the exhibition of motion pictures to adults. We urge that any such prior restraint is in contravention of the First Amendment. *Stanley v. Georgia*, 394 U.S. 557 (1969), discussed, infra.

Most of the defects of the Maryland statute are adequately explored by Appellants (J.S. 16 through 20). A reading of that statute reveals that it suffers from the fatal defect of vagueness. See *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 683 (1968). The statute's operative language reads as follows:

> "[The Board of Censors] shall approve and license such films or views which are moral and proper, and shall disapprove such as are obscene,[2] or such as

[2] Section 6(b) of the statute (J.S. 92a) reads: "For the purposes of this article, a motion picture film or view shall be considered to be obscene if, when considered as a whole, its calculated purpose or dominant effect is substantially to arouse sexual desires, and if the probability of this effect is so great as to outweigh whatever other merits the film may possess." This clearly is broader than the *Roth* standard.

tend, in the judgment of the Board, to debase or corrupt morals or incite to crimes." Art. 66A Md. Code Ann., Section 6(a) (J.S. 92a).

Section 6(c) of the statute, which was not relied upon by the Court below, but which defines part of the statute's operative language, declares that a film "would tend to debase or corrupt morals if its dominant purpose or effect is erotic or pornographic; or if it portrays acts of sexual immorality, lust or lewdness, or if it expressly or impliedly presents such acts as desirable, acceptable or proper patterns of behavior" (J.S. 93a). This language is so vague and sweeping that no judicial determination could bring it within the *Roth* test.[3] The Maryland statute is no more clear than those struck down by this Court in *Interstate Circuit*, supra, and *Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S. 684, 685 (1959): "would tend to corrupt morals or incite to crime . . ." The effect is to leave the motion picture maker and exhibitor "unable to determine what the [statute] means," *Interstate Circuit*, supra, 390 U.S. at 684.

The importance to the adult citizens of Maryland of a clear determination by this Court of whether their right to voluntarily view motion pictures is to be subjected to the restraining scrutiny of a Board of Censors, operating under a vague and overbroad statute, requires plenary review herein. cf. *Freedman v. Maryland*, 380 U.S. 51 (1965).

II. THE ROTH TEST OF OBSCENITY IS VAGUE AND UNWORKABLE

The *Roth* standard was refined by this Court in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General*, 383 U.S. 413, 418 (1966), (hereinafter "Memoirs") as follows:

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[3]Cf. *Hewitt v. Maryland State Board of Censors*, 254 Md. 179, 182-3 (1969), holding that the definition of obscenity in Section 6(b), supra, fn. 2, is co-extensive with the current interpretation of *Roth* by this Court.

> "We defined obscenity in *Roth* in the following terms: '[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests.' 354 U.S. at 489. Under this definition, as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."

Some twelve years of judicial experience in applying that standard leads to the plain conclusion that it suffers from the same "vagueness and overbreadth" that this Court declared unacceptable in the area of First Amendment rights in *NAACP v. Button*, 371 U.S. 415, 432-433 (1963). The standard is so broad and imprecise that it gives would-be producers and exhibitors of motion pictures (and writers and publishers of books) little warning as to what may or may not render their works "obscene" and therefore outside the pale of constitutional protection.[4]

An examination of the opinions in the Maryland Court of Appeals in the instant case reveals the inherent deficiencies of the *Roth* standard. The majority of four judges, despite finding that the bulk of the film is devoted to social matters and that "sexual activity is of an episodic nature"

[4] This Court listed the evils of such imprecision in *Interstate Circuit*, supra, 390 U.S. at 684: "... one who wishes to convey his ideas through [the medium of film], which of course includes one who is interested not so much in expression as in making money, must consider whether what he proposes to film, and how he proposes to film it, is within the terms of classification schemes such as this. If he is unable to determine what the ordinance means, he runs the risk of being foreclosed, in practical effect, from a significant portion of the movie-going public. Rather than running that risk, he might choose nothing but the innocuous."

(J.S. 4a), found that "the overriding theme is sex per se . . ." (J.S. 6a). The majority never articulates a reason for this finding except perhaps its statement that "we cannot ignore the visual impact of a motion picture as contrasted with the printed word." (J.S. 8a). On the basis of such analysis the majority concludes that "the dominant theme of the film, taken as a whole, appeals to prurient interest in sex . . ." (J.S. 9a). A reviewing court could not refute this determination, it could merely overrule it.[5] It is clear that there is no objective standard which a court can apply to this part of the *Roth* test except the overall impression of individual judges. In making such a determination, innumerable variables will influence the court which have no place in the formulation of vital First Amendment rights. These include the libidinous proclivities of individual judges and their interest in the types of non-sexual matters which are presented in a given work.

Even more imprecise and unpredictable is the second portion of the *Roth* test, which the majority found to have been met by holding that the film "is patently offensive in that it affronts contemporary community standards relating to the description or representation of sexual matters." (J.S. 9a). Yet there is not one iota of discussion in the majority opinion of how it ascertained the tenor of "contemporary community standards." The majority did find that the "main objective" of the film was "to purvey shocking and titillating sexual sequences." (J.S. 4a). However, these sequences were not enough, both qualitatively and quantitatively, to shock and titillate the three dissenters, who found the film to be "a crashing bore." (J.S. 36a).

Finally, the majority found that "I Am Curious (Yellow)" is "utterly without redeeming social value" (J.S. 9a). The

[5] *Amici* suggest that this is the reason for the extraordinary number of summary reversals by this Court of findings of obscenity; see J.S. 11-12.

subjectiveness, and therefore unpredictability, of this finding is revealed by the majority's statement of its reasoning:

> ". . . the attempts of the film makers to use social questions to depict the restlessness of youth and its search for identity, against an intellectual ambience, was patently strained and contrived. We do not think that Lena's [the heroine] concern with social and political problems, so artificially depicted, supplies the redeeming social quality required to sustain the film." (J.S. 9a).

Thus, the Maryland Court of Appeals applying the *Roth* standard acted as a motion picture critic in assessing the artistic coherence and effectiveness of a motion picture. Such a determination is plainly outside of the competence of a court.[6] In addition, it is inconsistent with this Court's reasoning in *Kingsley International Corp. v. Regents*, 360 U.S. 684, 688-689 (1959), that "the Constitution[al] . . . guarantee is not confined to the expression of ideas that are conventional or shared by a majority. . . . And, in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing." Yet here the majority found the attempted social commentary unconvincing and, therefore, that the film lacked any redeeming value. The *Roth* test pushed the Court into making an artistic determination which *Kingsley* prohibits.

Even with a clear obscenity standard, if it is indeed possible to formulate one, there would be some risk of multiple litigation and conflicting decisions. But the vagaries of the *Roth* standard make it almost inevitable that a person desiring to distribute a motion picture which explicitly deals with human sexual relations must be financially able to defend himself in many forums. Thus, Appellant, Grove Press, Inc., the sole United States distributor of "I Am Curious (Yellow)", is presently participating in 23 dif-

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[6] See statement of Justice Douglas concurring in *Memoirs*, supra: "We are Judges, not literary experts or historians or philosophers." 383 U.S. at 427.

ferent law suits in 13 states contesting whether the picture can be publicly exhibited.

Roth and its progeny have made this Court the ultimate arbiter of obscenity in each and every case in which that question arises over the publication of a writing or the exhibition of a motion picture.[7] And until this Court has ruled on the obscenity of a given publication or picture, multiple litigation will continue and the attendant economic burdens will chill basic civil rights. This is inconsistent with both the orderly workings of this Court and the constitutional guarantees of the First Amendment.

III. ADULTS HAVE THE RIGHT TO READ AND VIEW ANYTHING THEY DESIRE

This Court in *Stanley v. Georgia*, 394 U.S. 557 (1969) held that the First Amendment protects an individual's right to view a concededly obscene film within the confines of his own home. The reasoning in that case overturned *a fortiari* the basic supposition of *Roth* that "obscenity is not within the area of constitutionally protected speech or press", 354 U.S. at 485. It did so by finding that the First Amendment protected Mr. Stanley's "right to receive information and ideas, *regardless of their social worth* . . .", 394 U.S. at 564 (emphasis added).

In addition, *Stanley* raises the question of whether the exhibition of motion pictures to willing adults in closed theaters is sufficiently "public" to justify state proscription on grounds of obscenity. The dangers of public distribution, which justify governmental interference, are cited in *Stanley* to be "that obscene material might fall into the

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[7] Cf. Justice Douglas dissenting in *Ginsberg v. New York*, 390 U.S. 629, 656 (1968): "Today this Court sits as the Nation's board of censors. With all respect, I do not know of any group in the country less qualified first, to know what obscenity is when they see it, and second, to have any considered judgment as to what the deleterious or beneficial impact of a particular publication may be on minds either young or old."

hands of children . . . or that it might intrude upon the sensibilities or privacy of the general public", 394 U.S. at 567. *Amici* suggest that neither of these dangers can justify restraining the exhibition of a motion picture under circumstances, such as in the instant case (see J.S. 22), where children are barred from viewing the film and adults who pay the price of admission surely cannot have their sensibilities intruded upon.

We urge that this question is of fundamental importance and that this Court should have the advantage of briefs and arguments.

CONCLUSION

For the foregoing reasons this Court should note jurisdiction and direct the parties to prepare full briefs on the merits.

Respectfully submitted.

Thomas R. Asher
1320 Nineteenth Street, N.W.
Washington, D.C. 20036
Attorney for American Civil Liberties Union and Maryland Civil Liberties Union

David H. Schwartz
1815 H Street, N.W.
Washington, D.C.

John F. Graybeal
910 Seventeenth Street, N.W.
Washington, D.C.

Melvin L. Wulf
156 Fifth Avenue
New York, New York

Of Counsel